83-550

No. _____

In The

Supreme Court of the United States

October Term, 1983

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Where employer establishes or maintains an employee pension benefit plan whereby it provides retirement income to its employees and administers the plan through a general pension board consisting of employees appointed by the Board of Directors, is the employer a proper party to an action for the violation of an employee's rights under the Employee Retirement Income Security Act ("ERISA"), 29 U. S. C., Section 1001, *et seq.*?

2. Is the General Pension Board, as the plan administrator, an agent of the employer and, therefore, present jurisdictionally wherever the employer is found, or is the General Pension Board an entity which must be sued independently in an employee's action under ERISA, 29 U. S. C., Section 1132 (d) (2)?

PARTIES TO PROCEEDING

The parties to this proceeding are those named in the caption of the case, to wit: L. D. JAMESON and BETHLEHEM STEEL CORPORATION.

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OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are unreported and appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 10, 1983. The Petition for a Writ of Certiorari was filed within the period extended by Justice Brennan. This Court's jurisdiction is invoked under 28 U. S. C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1132(d), (e)(2), 29 U. S. C., appears in the Appendix hereto.

STATEMENT OF THE CASE

The petitioner, L. D. Jameson, filed an action in the district court under the provisions of the Employees Retirement Income Security Act ("ERISA"), 29 U. S. C., Section 1001, *et seq.* The jurisdiction of the court was invoked pursuant to 29 U. S. C., Section 1132(e)(1)(2)(f). The respondent successfully obtained dismissal of the complaint on the jurisdictional grounds that, (1) the respondent is not a proper party to the action, and (2) the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies is an indispensable party to the action, but is not subject to the jurisdiction of the court, and that venue of the action would be improper if it were named as the only defendant. The district court thereupon dismissed the action without prejudice. On appeal

to the Sixth Circuit, the court affirmed the dismissal of the complaint.

The complaint in summary discloses that the petitioner had been in the employ of the respondent's Iron Mines Company of Venezuela from May 5, 1953 to February 21, 1970. Thereafter, petitioner was transferred to the respondent's operations in Spain and in Sierra Leone, Africa, and continued in the respondent's employ until February 19, 1980. By virtue of the law of Venezuela, petitioner was entitled to and received payment of a severance allowance known as "Cesantia" and "Antiquedades," upon the termination of his employment in Venezuela. As a consequence of the petitioner's acceptance and retention of the severance allowance, and his refusal to repay it to the respondent upon his transfer to Spain, the respondent refused to credit the petitioner for the length of his service in Venezuela and classified him as a "new employee" for pension purposes. The loss of the credit for the years of employment in Venezuela resulted in the denial to the petitioner of a regular pension and other retirement benefits to which he was and is otherwise entitled. The crux of the petitioner's complaint is that the classification of him as a new employee upon his transfer to Spain constitutes a violation of the protective provisions contained in ERISA. The petitioner seeks injunctive relief against the respondent.

The respondent's denial of the full pension to the petitioner is based solely on the corporate policy of the respondent. The authority for this corporate policy is a certain Inter-Office Correspondence of Bethlehem Steel dated January 27, 1967 from the Secretary of the Pension

Board to the Vice President of Bethlehem Steel Corporation. The "Bethlehem 1977 Salaried Pension Plan," described as "Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies, adopted on January 25, 1923, as amended July 31, 1977, and further amended July 1, 1979, applicable to eligible salaried employees," provides, relevant hereto, as follows:

DEFINITIONS

Section 1.1.(i) "this Plan" means the "Bethlehem 1977 Salaried Pension Plan" adopted as an amendment to and continuation of the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies.

Section 7. ADMINISTRATION

7.1 A general Pension Board shall have the authority and responsibility for the administration of this Plan. The General Pension Board shall consist of five or more officers or employees of the Employing Companies to be appointed by the Board of Directors of the Corporation and to serve until their successors shall have been appointed in like manner. The General Pension Board shall appoint a Secretary and such Assistant Secretaries as it shall deem necessary or proper. Subject to action by the General Pension Board, the Secretary of the General Pension Board shall be the administrator of this Plan (herein "Plan Administrator") for all purposes of the Employee Retirement Income Security Act of 1974 (herein "ERISA"), with the powers and duties provided therein, and in this Plan. . . .

If any difference shall arise between the Plan Administrator and any participant, co-pensioner or surviving spouse under this Plan with respect to any matter arising under this Plan, including the right to receive benefits or the amount of such benefits, the question may be referred, upon the written request of such participant . . . to the General Pension Board for review.

Section 9. AMENDMENT OR TERMINATION

9.1 The Board of Directors of the Corporation shall have the right to modify, change, terminate, or partially terminate this Plan at any time. . . .

The informative and instructive booklet published by the respondent and entitled, "Pension Benefits for Eligible Bethlehem Salaried Employees," contains the following pertinent statements:

General Information.

The benefits described in this booklet are provided under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies (the Plan) as amended July 31, 1977. . . . Bethlehem Steel Corporation, Bethlehem, Pennsylvania 18016, is the sponsor of the Plan. Other subsidiary companies of Bethlehem have employees participating in the Plan. . . . The Plan is a defined benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA").

A General Pension Board consisting of five or more officers or employees of Bethlehem Steel Corporation and Subsidiary Companies has the authority and responsibility for the administration of the Plan. The Secretary of the General Pension Board is the Administrator of the Plan ("Plan Administrator") for all purposes of ERISA. The address of the Plan Administrator is Secretary of the General Pension Board, Bethlehem Steel Corporation, Bethlehem, Pennsylvania, 18016.

Service of legal process in actions arising under the Plan, including actions against the Plan Administrator or any Trustee in their official capacities, may be made upon Bethlehem Steel Corporation at its offices located at Martin Tower, Bethlehem, Pennsylvania 18016. (Italics ours.)

REASON FOR GRANTING THE WRIT

The decision below has disregarded the legislative intent of the Employee Retirement Income Security Act, 29 U. S. C., Section 1001, *et seq.*, concerning the broad and liberal venue provisions of the Act, and raises an issue of first impression and importance relative to Sections 1132(d) (1) and (e) (2).

The threshold question is whether the respondent and the pension plan are one and the same insofar as the venue requirements of ERISA are involved, or whether the pension plan is free of respondent's direction and control and, therefore, a separate entity.

In the instant suit, the petitioner alleges that Bethlehem Steel Corporation, respondent, violated his rights under the Employee Retirement Income Security Act ("ERISA"), 29 U. S. C., Section 1001, *et seq.* The Sixth Circuit concluded that the General Pension Board designated by the respondent as the Plan Administrator does not act as an agent of the respondent, that the Plan is a necessary party to the suit, and that, therefore, the petitioner's complaint must fail for failure to name the pension plan as a defendant.

Section 502 of ERISA, 29 U. S. C., Section 1132(d)(1), provides that "an employee pension benefit plan may sue or be sued under this subchapter as an entity." *Employee pension benefit plan* is defined in 29 U. S. C., Section 1002(3)(5)(B), as follows:

> . . . [T]he "employee pension benefit plan" and "pension plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained *by an employer* or by an employee organization or by

> both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program . . .
>
> (A) provides retirement income to employees, . . .
>
> The term "employee" means any person acting directly as an employer, or indirectly in the interest of the employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.
>
> The term "plan sponsor" means (1) the employer in the case of an employee benefit plan established or maintained by a single employer.

Subtitle A of Title I, Section 1, (3) (16) (A) (ii), of the Act states that the term *administrator* means the person specifically so designated by the terms of the instrument under which the plan is operated, or if an administrator is not so designated, the plan sponsor. According to Section 3(37) of the above title and Section 3, among those who may be responsible as administrators of pension plans are: Employers, Association of employers, Employee organizations, Joint labor-management boards or committees.

Venue in a case brought under ERISA is controlled by the provisions of 29 U. S. C., Section 1132(e)(2), which provides three possible grounds for bringing the action in the district court. It may be brought (1) where the plan is administered, or (2) where the breach took place, or (3) where a defendant resides or may be found. It is undisputed that the respondent is found in the district where it was sued and was properly served with process. The crucial question is whether the petitioner may pursue his rights under ERISA against the respondent alone. The Sixth Circuit relied upon the language of Section 1132-

(d)(1) to hold that the respondent is not a proper party to the action and that the petitioner should have sued the pension plan. Section (d)(1) provides, relevant hereto, that "An employee benefit plan may sue or be sued . . . as an entity." It would appear therefrom that the court construed the language "as an entity" to mean that the "Bethlehem 1977 Salaried Pension Plan, adopted as an amendment to and continuation of the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies" has a separate existence from the respondent, and, therefore, it is an indispensable party to the suit.

It is axiomatic that a corporation acts by and through its officers and employees, and that the action of the employee while performing within the scope of his employment is the action of the corporation. The record demonstrates that the respondent established and maintains the pension plan, promulgated the rules of the plan, appointed the members of the General Pension Board which acts as the Plan Administrator, and appoints the successors thereto, and, finally, the respondent retains the right to "modify, change, terminate or partially terminate [this] Plan at any time." It follows that the respondent exerts complete and total authority and responsibility over the pension plan directly through its employees. As the employer which established or maintains an employee pension benefit plan, it acts directly in relation to the pension plan, and is the plan sponsor. In the final analysis, the pension plan and the respondent are one and the same. Significantly, in connection with the issue herein, the respondent has published the information that "[s]ervice of legal process in actions arising under the Plan, including actions against the Plan Administrator or

any Trustee in their official capacities, may be made upon Bethlehem Steel Corporation at its offices at Martin Tower, Bethlehem, Pennsylvania, 18016." Thus, consistent with the express provisions and policies of ERISA, the employee pension benefit plan in this case is the respondent-employer, which may sue or be sued under the Act.

The issue of venue under ERISA must be approached by bearing in mind the broad Congressional policy favoring free access to federal courts. In general, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place for trial. This would not seem to be a valid concern in the instant case in view of the extent and widespread business activities of the respondent throughout the country. In any event, such does not seem to have been Congress's overriding concern in establishing ERISA venue. Judge Wallace of the Ninth Circuit Court of Appeals recognized this in his excellent opinion in *Varsic v. U. S. District Court for the Central District of California*, 607 F. 2d 245, at pp. 247-248, wherein he declared:

> The liberal intent of Congress, which is embodied in ERISA generally, and in Section 1132(e) (2) specifically, is clear. . . .
>
> We cannot agree with the Fund's contention that Congress intended to prevent the drain on pension funds which could result from subjecting them to suits in any direction in which covered work is performed. We conclude that, while Congress may have been concerned with such a possibility, it clearly struck the balance in favor of liberal venue.
>
> We find it significant that the term "found" employed by Congress in Section 1132(e) (2), has been

> construed liberally when used in other venue provisions.

The Court of Appeals for the Fifth Circuit in *Brown v. American Airlines, Inc.*, (1980) 621 F. 2d 653, 656, N. 1, stated:

> A potential ERISA plaintiff is granted a wide choice of Federal court venue, liberal service of process rules and relief from jurisdictional amount requirement.

There is a dearth of case law on the precise issue of the venue provision involved in the present suit. The legislative history of the venue provision is not helpful on this point, either. However, the Congressional intent in enacting ERISA reveals a policy of providing all interested parties with a "ready access to the Federal court," "broad remedies for redressing or preventing violations of the Act," and "nationwide service of process in order to remove a possible procedural obstacle to having all proper parties before the Court." 29 U. S. C., Section 1001 (b), H. R. Rep. No. 93-533, 93rd Cong., 1st Sess. 17 (1973), reprinted in *1974 U. S. Code Cong. & Admin. News*, P. 4639, 4655. Thus, it would appear that the Sixth Circuit has ruled contrary to the policy underlying ERISA and in disregard of the intent of Congress to provide "ready access to the Federal Courts" and "nationwide service of process."

CONCLUSION

The Sixth Circuit, in affirming the decision of the District Court, has frustrated the legislative intent and purpose of Congress to provide a wide choice of federal

court venue, nationwide service of process to facilitate the institution of judicial action by an aggrieved employee at a place convenient to him and to accord him ready access to the federal courts under the broad and liberal provisions of ERISA. We believe the instant case clearly exemplifies the problem, and, therefore, needs the careful and authoritative attention of this Court.

We, therefore, urge the Court to grant the petition for a writ of certiorari to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 82-3308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. D. JAMESON,

Plaintiff-Appellant,

vs.

BETHLEHEM STEEL CORPORATION,

Defendant-Appellee.

ORDER

(Filed June 10, 1983)

Before: LIVELY and ENGEL, Circuit Judges; and NEESE, Senior District Judge*

L. D. Jameson appeals from an order of the United States District Court for the Northern District of Ohio dismissing his action alleging that the defendant, Bethlehem Steel Corporation, violated his rights under the Employees Retirement Income Security Act ("ERISA"), 29 U. S. C. § 1001 *et seq.* In granting Bethlehem's motion to dismiss, the district court concluded that the corporation was not a proper party to the action because Jameson had "produced no evidence that Bethlehem controlled . . . [his] pension plan or had anything to do with its administration."

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* The Honorable C. G. Neese, Senior Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

Upon consideration, the court concludes, as did the district court, that plaintiff's complaint must fail for failure to name the pension plan as defendant. Under ERISA, a money judgment for benefits under a pension plan is enforceable only against the plan as an entity. Title 29 U. S. C. § 1132(d) provides:

> (d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.
>
> (2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

The general pension board and its secretary enjoy the status of fiduciaries under the provisions of ERISA and, therefore, they do not act as agents of Bethlehem Steel Corporation, its subsidiaries, or its corporate affiliates. *NLRB v. Amax Coal Co.*, 453 U. S. 322 (1981). Since the employees' benefit plan is a necessary party to any effective relief in plaintiff's ERISA action, *Hill v. Iron Workers Local Union No. 25*, 520 F. 2d 40, 42 n. 1 (6th Cir. 1975), plaintiff's action against Bethlehem Steel Corpora-

tion alone was properly dismissed without prejudice. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

APPENDIX B

Case No. C81-2478

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

L. D. JAMESON,

Plaintiff,

vs.

BETHLEHEM STEEL CORPORATION,

Defendant.

Judge John M. Manos

MEMORANDUM OF OPINION

(Filed March 29, 1982)

On December 14, 1981 plaintiff, L. D. Jameson, filed the above-captioned case alleging that the defendant, Bethlehem Steel Corporation (hereinafter, Bethlehem), violated certain of his rights under the Employee Retirement Income Security Act (hereinafter, ERISA), 29 U. S. C. § 100, *et seq.* Jameson seeks damages and injunctive relief.[1] Jurisdiction is invoked under 29 U. S. C.

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[1]The action is brought under ERISA's civil enforcement provision. *See:* 29 U. S. C. §§ 1132(a)(1)(B) and (a)(3), which provide as follows:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

. . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

§ 1132(e) (1).[2] On February 16, 1982 Bethlehem filed a motion to dismiss asserting that: (1) "[it] is not a proper party to this action;" and (2) "[t]he Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies is an indispensable party to this action, but it is not subject to the jurisdiction of this court; and the venue of this action would be improper if it were named as the only defendant." For the reasons which follow Bethlehem's motion is granted and the case is dismissed without prejudice.

From May 5, 1953 until February 28, 1970 Jameson was employed in Venezuela by the Iron Mines Company, a wholly owned subsidiary of Bethlehem. In 1970 he was transferred to Spain where he remained employed until 1979. At that time he returned to the United States and was nominally employed at fifty (50) percent of his regular salary until February 29, 1980 when he resigned pursuant to an agreement with Bethlehem.

When Jameson's employment in Venezuela was terminated Venezuelan law required Bethlehem to pay him a form of severance or separation pay known as "Cesantia" and/or "Antiquedades," in the sum of $56,492. At the time of the payment Bethlehem's corporate policy pro-

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[2] 29 U. S. C. § 1132(e)(1) provides as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

vided Jameson with the option of either keeping the severance and losing, for pension purposes, credit for the length of his service in Venezuela, or returning the severance and having his previous service in Venezuela restored. Jameson elected to keep the payment. Accordingly, in 1970 when Jameson was transferred to Spain he was categorized as a "new employee" for pension purposes. The thrust of Jameson's complaint is that Bethlehem's corporate policy, as well as its categorization of him as a new employee incident to his transfer to Spain, constitute violations of the minimum vesting standards contained in ERISA. *See*: 29 U. S. C. § 1053.

Bethlehem's pension plan was originally adopted in 1923. It currently provides pension benefits for all eligible employees in relation to their number of years of continuous service. The term, "continuous service" is defined as continuous service in Bethlehem's employ calculated from the employee's last hiring date. Bethlehem Pension Plan § 5.1.[3] For the period prior to July 31, 1977 the determination of the last hiring date is "based on the practices in effect at the time the break [in continuous service] occurred." *Id.*

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[3]Bethlehem Pension Plan § 5.1 provides in pertinent part as follows:

> *The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies,* except as in this Section 5 otherwise provided, prior to retirement *calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of re-employment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred. . . .* (Emphasis added.)

The Bethlehem Pension Plan provides for its administration by a General Pension Board and by the Secretary of the Board, who acts as administrator of the plan. Bethlehem Pension Plan § 7.1.[4] Subject to action by the General Pension Board, the Secretary is vested with the power to grant whatever benefits are provided by the plan as well as the power to decide any questions that may arise incident to its operation. *Id.* In this case, the Secretary, with the approval of the General Pension Board, determined that Jameson was not entitled to credited service for the length of his employment in Venezuela.

29 U. S. C. § 1132(d) provides as follows:

(1) ***An employee benefit plan may sue or be sued under this subchapter as an entity.*** Service of sum-

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[4]Bethlehem Pension Plan § 7.1 provides in pertinent part as follows:

A General Pension Board shall have the authority and responsibility for the administration of this Plan. The General Pension Board shall consist of five or more officers or employees of the Employing Companies to be appointed by the board of Directors of the Corporation and to serve until their successors shall have been appointed in like manner. The General Pension Board shall appoint a Secretary and such Assistant Secretaries as it shall deem necessary or proper. Subject to action by the General Pension Board, the Secretary of the General Pension Board shall be the administrator of this Plan (herein "Plan Administrator") for all purposes of the Employee Retirement Income Security Act of 1974 (herein "ERISA") with the powers and duties provided therein and in this Plan, including the following powers and duties:

(a) To grant such pensions as are provided for under this Plan.

(b) To make and enforce such rules and regulations (herein "the Regulations") as the Plan Administrator shall deem necessary or proper for the efficient administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan.

mons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) *Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.* (Emphasis added.)

Clearly, the Bethlehem Pension Plan is a necessary party to this action since no effective relief can be granted without its joinder. *Hill v. Iron Workers Local Union No. 25,* 520 F. 2d 40, 42, n. 1, citing 29 U. S. C. §§ 1132(a) and (e) (6th Cir. 1975); *Boyer v. J. A. Majors Co., Employees' Profit Sharing Plan,* 481 F. Supp. 454 (N. D. Ga. 1979); *Barrett v. Thorofare Markets, Inc.,* 452 F. Supp. 880 (W. D. Pa. 1978); *Carter v. Montgomery Ward & Co.,* 76 F. R. D. 565 (E. D. Tenn. 1976); *See also*: *Upshaw v. Equitable Life Assurance Society of the United States,* 85 F. R. D. 674 (E. D. Ark. 1980). Since the Bethlehem Pension Plan is managed and controlled exclusively by the General Pension Board and its Secretary and Jameson has produced no evidence that Bethlehem controlled the plan or had anything to do with its administration, Bethlehem is not a proper party to this action. Therefore, Bethlehem's motion to dismiss is granted.

Although the court has found that the granting of Bethlehem's motion to dismiss is warranted, the inquiry in this case is not ended since such a dismissal is without prejudice under Fed. R. Civ. P. 41(b) and Jameson could easily rectify the defect by refiling his complaint against the Bethlehem Pension Plan.[5] Considering that both parties have briefed the issue, the court shall address whether it would sustain personal jurisdiction and, therefore, venue under 29 U. S. C. § 1132(e) (2), if the Bethlehem Pension Plan was joined as a defendant in this action.[6]

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[5]Fed. R. Civ. P. 41(b) provides as follows:

> **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, *or for failure to join a party under Rule 19*, operates as an adjudication upon the merits.

[6]29 U. S. C. § 1132(e)(2) provides as follows:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

For the reasons which follow this court holds that the question presented must be resolved in the negative.

29 U. S. C. § 1132(e) (2) provides that a plaintiff may bring an action where: (1) a pension plan is administered; or (2) a breach took place; or (3) a defendant resides; or (4) a defendant may be found.[7] In this case it is undisputed that: (1) the offices of the Bethlehem Pension Plan's General Pension Board and its Secretary are located in Bethlehem, Pennsylvania; (2) all of the members of the General Pension Board and the Secretary reside in, or in the vicinity of, Bethlehem Pennsylvania; (3) all of the business of the General Pension Board is conducted in Bethlehem, Pennsylvania; (4) the Bethlehem office is where all of the pension plan's records are located; and (5) neither the General Pension Board nor the Secretary maintain an office, conduct any business or keep any records in the State of Ohio.[8] Thus, it is clear that the Bethlehem Pension Plan is neither a resident of, nor administered in, this judicial district. *See*: *Bostic v. Ohio River Co. (Ohio Division), Basic Pension Plan,* 517 F| Supp. 627 (S. D. W. Vir. 1981); *Boyer v. J. A. Majors Co., Employees' Profit Sharing Plan, supra; Sprinzen v. Supreme Court of New Jersey,* 478 F. Supp. 722 (S. D. N. Y. 1979). It is equally clear that the alleged breach did not occur

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[7]Contrary to Jameson's assertion it is ERISA's special venue provision rather than 28 U. S. C. § 1391 (the general federal venue statute) and/or 28 U. S. C. § 1404 (change of venue for convenience of the parties), which controls the issue of whether venue is proper in this case. *See: Boyer v. J. A. Majors Co., Employees' Profit Sharing Plan,* 481 F. Supp. 454, 459 (N. D. Ga. 1979).

[8]Affidavit of David W. Kempken, Secretary of the General Pension Board of the Bethlehem Pension Plan, p. 3, ¶¶ 8-10.

here. As noted above, at the time Jameson was informed of Bethlehem's corporate policy providing him with the option of either keeping the severance payment and losing credit for the length of his service or returning the payment and having his previous service restored, he was a resident of Venezuela in the process of moving to Spain.[9] *See*: *Boyer v. J. A. Majors Co., Employees' Profit Sharing Plan, supra,* in which the court, confronted with a claim that a breach occurred in Georgia when a Texas bank issued a stop order in Texas on a pension check it had sent to the plaintiff in Georgia, held that the breach, if any, occurred in Texas. Accordingly, under 29 U. S. C. § 1132(e) (2) venue of this action is properly in this district only if the Bethlehem Pension Plan "may be found" here. Since it has been uniformly held that, for ERISA purposes, a defendant pension fund "may be found" in a judicial district only if a court in that district could sustain personal jurisdiction over the fund, *Woodfork v. Marine Cooks & Stewards Union,* 642 F. 2d 966, 975, n. 9 (5th Cir. 1981); *Varsic v. United States District Court for the Central District of California,* 607 F. 2d 245 (9th Cir. 1979); *Bostic v. Ohio River Co. (Ohio Division), Basic Pension Plan, supra; Turner v. C F & I Steel Corporation,* 510 F. Supp. 537 (E. D. Pa. 1981), the determinative question presented to this court is whether the Bethlehem Pension Plan had sufficient contacts with the State of Ohio to satisfy the constitutional requirement of "minimal contact with the forum state." *See, e. g., International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 158 (1954); *Shaffer v. Heitner,* 433 U. S. 186, 97 S. Ct. 2569

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[9]According to Bethlehem's records, Jameson is currently a resident of Las Cruces, New Mexico.

(1977); *McGee v. International Life Insurance Co.*, 355 U. S. 220, 78 S. Ct. 199 (1957). For the reasons which follow this court holds that the Bethlehem Pension Plan had no such contacts with the State of Ohio.

In determining whether sufficient minimum contacts exist to permit the exercise of personal jurisdiction over a nonresident defendant the Sixth Circuit Court of Appeals has held that the following "three-fold" analysis should be applied:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F. 2d 220, 226 (6th Cir. 1972). *See also*: *Southern Machine Co. v. Mohasco Industries, Inc.*, 410 F. 2d 374, 381 (6th Cir. 1968). Relying on its previous decision in *Southern Machine*, the Sixth Circuit Court of Appeals defined the purposeful action requirement as follows:

> In this Circuit one has "acted" so as to transact business in a state "when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state." Such "acts" become purposeful if the defendant "should have reasonably foreseen that the transaction would have consequences in that state." 401 F. 2d 374, 382-383.

In-Flight Devices Corp. v. Van Dusen Air, Inc., supra, at 226. Applying the standard cited above to the present

case this court holds that the Bethlehem Pension Plan did not purposefully act in Ohio. The pension plan was not enacted in Ohio nor did any of the actions contributing to the alleged breach occur in Ohio. The evidence in this case clearly establishes that this court would not sustain personal jurisdiction over the Bethlehem Pension Plan if it was joined as a defendant. Therefore, venue in this judicial district under 29 U. S. C. § 1132(e) (2) would also be improper because the Bethlehem Pension Plan cannot be "found" here.

Accordingly, the defendant's motion to dismiss is granted and the case is dismissed without prejudice.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX C

CASE NO. C81-2478

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

L. D. JAMESON,

Plaintiff,

vs.

BETHLEHEM STEEL CORPORATION,

Defendant.

Judge John M. Manos

ORDER

(Filed March 29, 1982)

Pursuant to the Memorandum Opinion issued in the above-captioned case this date, the defendant's motion to dismiss is granted and the case is dismissed without prejudice.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX D

29 U. S. C., Section 1132(d):

> (d)(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.
>
> (2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Section 29 U. S. C., Section 1132 (e) (2):

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the Plan is administered, where the breach took place, *or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.* (Italics ours.)

CASE NO. 83-550

In The

Supreme Court of the United States

October Term, 1983

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

1. Whether a participant under a pension plan may bring an action against his former employer to recover pension benefits and to enforce rights under the pension plan, without suing the pension plan, under Section 502 (a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1132(a)(1)(B).

PARTIES TO PROCEEDING

All of the parties are listed in the caption. Bethlehem Steel Corporation has no parent. Its shares are publicly traded. Virtually all of its subsidiaries are either wholly owned directly by it or indirectly through its subsidiaries. None of the subsidiaries or other affiliates in which Bethlehem Steel Corporation owns an interest has publicly-traded shares.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. The Order of the Court of Appeals is printed as Appendix A to the Petition for a Writ of Certiorari, at App. 1-3.

The Opinion of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. The Memorandum of Opinion and the Order of the District Court are printed as Appendices B and C to the Petition for a Writ of Certiorari, at App. 4-14.

JURISDICTION

The petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1). The respondent does not contest the jurisdiction of this Court to consider the Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 502 (a)(1)(B), (d)(1) and (2), and (e)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1132(a)(1)(B), (d)(1) and (2), and (e)(2). Section 502(a)(1)(B) of ERISA, 29 U.S.C. Section 1132 (a)(1)(B), reads, as follows:

> "(a) A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . ."

The remaining statutory provisions are printed as Appendix D to the Petition for a Writ of Certiorari, at App. 15.

STATEMENT OF THE CASE

A. The Proceedings

The petitioner, L. D. Jameson, filed this action in the Northern District of Ohio, Eastern Division. There was no evidence that the petitioner was ever employed in the Northern District of Ohio or that he ever resided in the Northern District. The only evidence was that the petitioner had been employed abroad and resided in Las

Cruces, New Mexico. The only nexus with the Northern District was that petitioner's attorney had an office in the Northern District.

The only defendant named in the action was the respondent, Bethlehem Steel Corporation. It employed the petitioner from 1975 to 1980. It sponsored a pension plan for its employees and the employees of certain of its subsidiary companies, the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Plan").

The Pension Plan was not named as a defendant in the action. It was uncontested that the Northern District did not have personal jurisdiction of the Pension Plan.

The Complaint alleged that the failure to credit the petitioner with his service with one of respondent's affiliated companies, The Iron Mines Company of Venezuela, for pension purposes, violated ERISA, 29 U.S.C. Section 1001, *et seq*. The primary relief sought by the petitioner was the payment of pension benefits and other retirement benefits allegedly due under the Pension Plan.

The respondent moved to dismiss the action on the grounds that (1) it was not a proper party and (2) the Pension Plan was an indispensable party but was not subject to the jurisdiction of the Northern District.

The District Court granted respondent's Motion to Dismiss on both grounds and dismissed the action without prejudice. The District Court ruled that the respondent as the former employer and the plan sponsor was not a proper party. It also ruled that the Pension Plan was an indispensable party to the action, but was not subject to the jurisdiction of the Northern District. It found that the Pension Plan was "managed and controlled exclusively by the General Pension Board and its Secretary . . . ." It also found that the petitioner had "produced no evidence that [respondent] controlled the plan or had anything to do with its administration . . . ." It further found that the

Secretary of the General Pension Board, with the approval of the General Pension Board, had "determined that [petitioner] was not entitled to credited service for the length of his employment in Venezuela."

In his appeal to the Court of Appeals, petitioner contended that he was entitled to bring the action solely against respondent. He argued that he could litigate against respondent the determination made by the Secretary, with the approval of the Board, that he was not entitled to credited service for pension purposes for the period of his Venezuelan employment, on the ground that respondent controlled the General Pension Board. He did not contest the District Court's finding that it could not sustain personal jurisdiction over the Pension Plan.

The Court of Appeals rejected petitioner's arguments. It concluded that his Complaint "must fail for failure to name the pension plan as defendant." It ruled that the Pension Plan was a necessary party to any effective relief in petitioner's action. It also ruled that the General Pension Board and its Secretary were fiduciaries under ERISA and that they did not act as agents of respondent in their capacity as fiduciaries, relying on this Court's opinion in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

B. The Facts

1. *Petitioner's Employment*

Petitioner was employed by respondent from June 1, 1975 until February 29, 1980. He was previously employed by one of respondent's affiliated companies, The Iron Mines Company of Venezuela, from May 5, 1953 until February 28, 1970. On the termination of his employment in Venezuela, he was paid "Cesantia" and "Antiquedades", a form of separation pay required by Venezuelan law, in the total sum of $56,492. He had the option, under respondent's policy, of repaying the "Cesantia" and "Antiquedades" and having his service in Venezuela re-

stored for the purpose of pension benefits. However, he elected to retain the "Cesantia" and "Antiquedades" and to start as a new employee with a second affiliated company, Bethlehem Mines Corporation. He was employed by Bethlehem Mines Corporation from March 1, 1970 until May 31, 1975.

Petitioner qualified for a deferred vested pension under the Pension Plan, based on his service with Bethlehem Mines Corporation and with respondent from March 1, 1970 to February 29, 1980. He has the option of receiving pension benefits at age 65 or reduced pension benefits beginning at age 60.

2. *The Pension Plan*

The Pension Plan provides for pension benefits for eligible employees. The benefits are based on years of continuous service with respondent and its affiliated companies who have adopted the Pension Plan. The term "continuous service" is defined in Section 5.1 of the Pension Plan to mean continuous service in the employ of respondent or its covered affiliated companies calculated from the employee's last hiring date. Under Section 5.1 of the Pension Plan that was in effect when petitioner terminated his employment, the determination of the last hiring date was based on the practices that were in effect at the time a break in service occurred. In petitioner's case, his break in service occurred on February 28, 1970 with the termination of his employment with The Iron Mines Company of Venezuela. He started his employment with Bethlehem Mines Corporation on March 1, 1970 as a new employee because of his election to retain the "Cesantia" and "Antiquedades".

The Pension Plan provides for its administration by the General Pension Board and by the Secretary of the Board who acts as the Plan Administrator. The Board has the authority and responsibility for the administration of

the Pension Plan. Subject to action by the Board, the Secretary has the powers and duties under the Pension Plan, including the power and duty to grant such benefits as are provided for under the Pension Plan and to decide such questions as may arise in connection with the operation of the Pension Plan, including determinations concerning credited service.

The Secretary and the General Pension Board made the determination that petitioner was not entitled to credited service under the Pension Plan for the length of his employment with The Iron Mines Company of Venezuela.

SUMMARY OF ARGUMENT

There are no grounds for granting the Petition for a Writ of Certiorari. The lower courts ruled correctly that respondent was not a proper party and that the Pension Plan was an indispensable party. Their decisions are fully in accord with the existing case law. There is no conflict in the federal courts of appeal.

Petitioner's attempt to argue that respondent controls the General Pension Board and its Secretary is contrary to the record in this action, contrary to ERISA, and contrary to this Court's decision in *NLRB v. Amax Coal Co., supra.* The Board and its Secretary are fiduciaries and are not subject to respondent's control in their capacity as fiduciaries.

Petitioner's attempt to phrase the issue in terms of ERISA's venue provisions is belied by the record. The issue is not venue, but whether petitioner can pursue his claim for pension benefits solely against his former employer.

The issue of petitioner's right to pursue his claim for pension benefits solely against his former employer is of little consequence. It is plain from ERISA's provisions that participants in a pension plan will normally pursue

their claims for pension benefits against their pension plan and not against their former employer.

ARGUMENT

There are no grounds for granting the Petition for a Writ of Certiorari. There are no issues that warrant this Court's review.

A. The Lower Courts Ruled Correctly

The lower courts ruled correctly that respondent was not a proper party and that the Pension Plan was an indispensable party. The District Court's dismissal of the action, without prejudice, was fully in accord with the case law.

Respondent was not a proper party. It was only petitioner's former employer and the sponsor of the Pension Plan. It was not the administrator of the Pension Plan, and it did not control the administration of the Pension Plan. It did not make the determination that petitioner was not entitled to credited service under the Pension Plan for his Venezuelan employment.

The Pension Plan was a necessary party. The Pension Plan provided the benefits. The General Pension Board and its Secretary determined that petitioner was not entitled to credited service under the Pension Plan for his Venezuelan employment.

It is plain from the case law that respondent, as the former employer and the plan sponsor, was not a proper party. The federal courts have repeatedly ruled that an employer who sponsors a pension plan is not a proper party in an action for pension benefits under ERISA. The courts have reasoned that the employer does not provide the benefits and that no effective relief can be granted against the employer. *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565 (E.D. Tenn. 1977); *Barrett v. Thoro-*

fare Markets, Inc., 452 F. Supp. 880 (W.D. Pa. 1978); *Boyer v. J. A. Majors Company Employees' Profit Sharing Plan*, 481 F. Supp. 454 (N.D. Ga. 1979); *Higman v. Amsted Industries, Inc.*, ... F. Supp. ...., CCH Pension Plan Guide ¶ 23,554 (E.D. Pa. 1981).

It is equally plain from ERISA and the case law that the Pension Plan was an indispensable party. ERISA plainly provides that an employee benefit plan can be sued as a legal entity, 29 U.S.C. Section 1132(d)(1), and that a money judgment for pension benefits is enforceable only against the plan as an entity, 29 U.S.C. Section 1132 (d)(2). The federal courts have repeatedly ruled that an employee benefit plan is a necessary party to any effective relief in an action for benefits under ERISA. *Hill v. Iron Workers Local Union No. 25*, 520 F. 2d 40, 42, n. 1 (6th Cir. 1975); *Carter v. Montgomery Ward & Co., supra; Barrett v. Thorofare Markets, Inc., supra; Boyer v. J. A. Majors Company Employees' Profit Sharing Plan, supra.*

Petitioner's argument that respondent controls the General Pension Board and its Secretary is contrary to the District Court's finding, contrary to the provisions of ERISA, and contrary to this Court's decision in *NLRB v. Amax Coal Co., supra.* The District Court found that the Pension Plan was "managed and controlled exclusively by the General Pension Board and its Secretary . . . ." It also found that petitioner had "produced no evidence that [respondent] controlled the plan or had anything to do with its administration . . . ." Under the provisions of ERISA, the Pension Plan is an independent entity, and the General Pension Board and its Secretary are fiduciaries who are required to act solely in the interest of the Pension Plan's participants and beneficiaries, 29 U.S.C. Section 1104(a)(1). The General Pension Board and its Secretary do not act as employees, officers

or agents of respondent in their capacity as fiduciaries. Under this Court's decision in *NLRB v. Amax Coal Co.*, their status as fiduciaries is "directly antithetical to that of an agent" of respondent, 453 U.S. at 331-332.

Petitioner's additional argument that he can litigate the question of his credited service with respondent because it appoints the members of the General Pension Board and has retained the right to amend the Pension Plan is meaningless. Petitioner's credited service under the Pension Plan was determined by the Secretary, with the approval of the General Pension Board, on the basis of the existing language of Section 5.1 of the Pension Plan and respondent's practices in effect in 1970. Petitioner's claim that the denial of credited service violated ERISA applies only to the language of the existing Plan, as interpreted by the Secretary and the existing General Pension Board.

Petitioner's arguments are without factual and legal support. They were rejected by both the District Court and the Court of Appeals. Petitioner has not cited a single case that supports his arguments that he can litigate a claim for pension benefits solely against respondent as the former employer and plan sponsor.

B. The Petition Is Based On A False Issue

Petitioner's attempt to persuade this Court to grant a Writ of Certiorari is based on a false issue. The issue of venue under ERISA is not involved in this action. The only question presented is whether a participant may bring an action to recover pension benefits and to enforce rights under a pension plan against his former employer and the plan sponsor, without suing the pension plan.

Petitioner has made no attempt to sue the Pension Plan. He did not contest the ruling of the District Court that it could not assert personal jurisdiction over the

Pension Plan. The question of the interpretation of the venue provisions under ERISA is not presented by this case.

Petitioner's citation of the cases of *Varsic v. U.S. Dist. Ct. for Cent. Dist. of Ca.*, 607 F. 2d 245 (9th Cir. 1979) and *Bonin v. American Airlines, Inc.*, 621 F. 2d 635 (5th Cir. 1980) is irrelevant. Neither case involves the question of whether a participant can litigate his right to pension benefits by suing only his former employer and not the pension plan.

The venue provisions of ERISA are simply not in issue in this action. Petitioner's attempt to describe this case as involving issues of "ready access to the Federal court" and of "broad remedies for redressing or preventing violations" of ERISA simply has no basis in the record of this action.

The issue that is presented by this action is of no importance to the interpretation of ERISA. Participants will normally proceed against their pension plans, even though they may also incorrectly sue their former employers. *See Carter v. Montgomery Ward & Co., supra; Barrett v. Thorofare Markets, Inc., supra; Boyer v. J. A. Majors Company Employees' Profit Sharing Plan, supra.*

The District Court's dismissal of this action, without prejudice, was not unfair to petitioner. He has no contacts with the Northern District and there is no factual basis for asserting personal jurisdiction over the Pension Plan in the Northern District. In fact, the record shows that this action was brought in the Northern District only because the petitioner's attorney has an office in the District.

Petitioner's attempt to litigate the question of his right to pension benefits by suing only his former employer could lead to absurd results. Judgments rendered by the District Courts could be virtually meaningless, as the pension plans would not be bound by the judgments.

Pension plans are separate entities, and money judgments for benefits are enforceable only against the plans as entities, by the very terms of ERISA.

CONCLUSION

There are no grounds for granting the Petition for a Writ of Certiorari. There are no issues that warrant this Court's review. This Court should deny the Petition.

Respectfully submitted,

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